No. 90-368

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SHELDON BARUCH TOIBB,
Petitioner,
v.
STUART J. RADLOFF, TRUSTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

Of Counsel:
JONATHAN W. BELSKY
7818 Forsyth Blvd.
Suite 200
Clayton, Missouri 63105
(314) 726-5068

TIMOTHY B. DYK
(Counsel of Record)
PETER M. LIEB
DOUGLAS B. LEVENE
PATRICK J. POTTER
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-368

SHELDON BARUCH TOIBB,
Petitioner,

v.

STUART J. RADLOFF, TRUSTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT

Conceding that "Section 109(d), which defines who may be a debtor under Chapter 11, contains no explicit ongoing business requirement," Brief of Amicus Curiae in Support of the Judgment Below ("Amicus Brief") at 4; *see also id.* at 10, the amicus cobbles together selected provisions of the Bankruptcy Code and legislative history in support of its claim that the Court should read such a requirement into the Code. The nub of the amicus's argument is that chapter 11's exclusive purpose is to reorganize "financially troubled business enterprises in order to keep them in operation, preserve jobs and protect in-

vestors," Amicus Brief at 5; *see also id.* at 4, and the Court is therefore justified in ignoring the statutory language to give effect to this purpose. Congress's explicit language cannot be so lightly disregarded, and the amicus has in any event misconceived the statutory purpose.

1. This argument overlooks a fundamental policy of the Bankruptcy Code, which is "to maximize the value of the estate." *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 352 (1985). That policy is reflected in chapter 11's provisions permitting the debtor to liquidate under chapter 11 as an alternative to chapter 7 in order to maximize the value of the estate.

Section 1123(b)(4) of the Code specifically provides that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. § 1123(b)(4) (1988).[1] Indeed, a leading treatise recognizes that in some cases, liquidation under chapter 11 may be less expensive and more efficient than liquidation under chapter 7:

> By enabling the debtor to liquidate in the chapter 11 case rather than requiring conversion to a case under chapter 7, substantial costs might be avoided, such as the payment of trustee's fees and the fees of professionals which would have been employed by the trustee. In addition, due to the debtor's management's experience in dealing with the property of the estate, such management might be better able to dispose effectively of the property than would an independent trustee. Furthermore, the ability to utilize a chapter 11 plan for the effectuation of a liquidation may enable the liquidation to be accomplished over a relatively longer period of time, thus possibly optimizing the liquidation recoveries.

[1] Other provisions which reflect the possible use of chapter 11 to effect a liquidation rather than a rehabilitation of the debtor include section 1129(a)(11), 11 U.S.C. § 1129(a)(11) (1988); section 1141(d)(3), 11 U.S.C. 1141(d)(3) (1988); and section 1123(a)(5)(D), 11 U.S.C. § 1123(a)(5)(D) (1988).

A. Herzog & L. King, 5 *Collier Bankruptcy Practice Guide* ¶ 90.04[4], at 90-24 (1990). These goals are also reflected in the petitioner's plan, which was designed to achieve the central purpose of maximizing the value of the estate.

In asserting that the only purpose of chapter 11 is to provide for the rehabilitation of financially troubled businesses, the amicus fails even to acknowledge the underlying Congressional goal of maximizing the value of the bankruptcy estate, *Weintraub*, 471 U.S. at 352, let alone attempt to reconcile that goal with its claim that non-business debtors should be excluded from chapter 11.

2. The amicus also argues that "the legislative history conclusively confirms . . . that Chapter 11 is intended solely for business reorganizations." Amicus Brief at 11. To be sure, the legislative history contains many references to the business uses of chapter 11. But those references only demonstrate Congress's expectation that chapter 11 would be predominantly used by businesses. At the same time, the House and Senate Reports also contemplated that individuals without businesses would be eligible for chapter 11:

> Chapter 11, Reorganization, is primarily designed for businesses, but permits individuals to use the chapter. The procedures of chapter 11, however, are sufficiently burdensome that their use will only make sense in the business context, and not in the consumer context.

H.R. Rep. No. 595, 95th Cong., 1st Sess., at 6 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5968; S. Rep. No. 989, 95th Cong., 2d Sess., at 3 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5789. These reports thus make clear that chapter 11 was not exclusively designed for businesses, and that Congress

understood that consumers would use other chapters, not because they are ineligible for chapter 11, but rather to avoid chapter 11's complexity.[2]

3. Relying on *United Savings Ass'n, of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380-81 (1988), and the fact that former chapter X was not available to individuals, the amicus also contends that "[t]here is no basis for 'presuming' that consumer debtors are eligible for relief under Chapter 11 simply because they were eligible for relief under [former chapter XI] . . . ." Amicus Brief at 19. While we acknowledge that former chapter X was limited to corporations while former chapter XI was available to individuals, the issue is whether Congress adopted the practice under one chapter over the other. Just as in *Timbers of Inwood Forest*, where this Court found that "Congress adopted the approach of Chapters X and XII," 484 U.S. at 381, the language of the Code and the legislative history here demonstrate that Congress chose the practice in former chapter XI of permitting individuals to reorganize over the practice in former chapter X limiting reorganization to corporations.

First, the plain meaning of sections 109 and 101(37) of the Bankruptcy Code is that, with certain inapplicable exceptions, all individuals who are eligible for chapter 7 are also eligible for chapter 11. The words of the statute thus provide a clear indication that Congress adopted the practice in former chapter XI of permitting individuals without businesses to reorganize. Chapter 11's availability to some individuals, which is conceded,[3] is a further indication that Congress chose the practice under

[2] In suggesting that Petitioner "is forced to concede that the legislative history he cites . . . is 'less than conclusive,'" the Amicus Curiae has distorted the argument in petitioner's main brief. Amicus Brief at 14 n. 8 (quoting Pet. Br. at 19).

[3] *See* Amicus Brief at 14 (asserting that certain statements in legislative history "should be interpreted to indicate that only individuals operating businesses may use chapter 11") (emphasis omitted).

former chapter XI over former chapter X, which was only available to corporations.[4]

Second, while chapter 11 represents a consolidation of former chapters X, XI and XII, the legislative history suggests that the consolidation was accomplished by permitting public companies to reorganize using the flexible procedures in former chapter XI, not by restricting chapter 11 reorganization to businesses. The legislative history is replete with statements indicating that "the more simple and expeditious procedures of chapter XI are appropriate in the great majority of cases," 124 Cong. Rec. 34005 (1978) (remarks of Sen. DiConcini), and that "chapter X has been far from a success." *Id.*[5] Concluding that "Chapter X was an anachronism," L. King, 5 *Collier on Bankruptcy* ¶ 1125.02, at 1125-12 (15th ed. 1990), the Code's sponsors consolidated the former reorganization chapters in part by "dismantling . . . the Chapter X scheme." *Id.* at 1125-14.[6]

[4] *See* section 126 of the former Bankruptcy Act, 11 U.S.C. § 526 (1976) (repealed 1979).

[5] *See also* 124 Cong. Rec. 32404 (1978) (remarks of Rep. Edwards) ("The House amendment deletes the 'public company' exception [to chapter 11 in the Senate bill], because it would codify well recognized infirmities of Chapter X, because it would extend the Chapter X approach to a large number of new cases without regard to whether the rigid and formalized procedures of Chapter X are needed, and because it is predicated upon the myth that provisions similar to those contained in Chapter X are necessary for the protection of public investors. Bankruptcy practice in large reorganization cases has also changed substantially in the 40 years since the Chandler Act was enacted. This change, in large part, is attributable to the pervasive effect of the Federal securities laws and the extraordinary success of the Scurities and Exchange Commission in sensitizing both management and members of the bar to the need for full disclosure and fair dealing in transactions involving publicly held securities."); 124 Cong. Rec. 34004 (1978) (remarks of Sen. DiConcini).

[6] Unlike *Timbers of Inwood Forest*, where the asserted practice was "far from clear," 484 U.S. at 381, here the amicus curiae does not dispute that former chapter XI was available to individuals without businesses.

4. The amicus also contends that the express limitations in the Code outside of section 109 on individuals permitted to proceed under chapter 7 [7] somehow supports the argument that this Court should create a non-statutory limitation against chapter 11 proceedings by individuals not engaged in business. Amicus Brief at 6-8. However, the very absence of similar statutory limitations with respect to consumer debtors suggests, in light of the comprehensive and detailed statutory scheme, that Congress did not intend to exclude consumer debtors from the scope of chapter 11.

5. The concern the amicus raises that individuals may not cooperate in involuntary chapter 11 cases, Amicus Brief at 15-16, can be dismissed for two reasons. First, Congress's decision to preclude involuntary chapter 13 cases was based on the unique requirement in chapter 13 that a plan "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for execution of the plan." 11 U.S.C. § 1322 (a)(1) (1988). Congress was concerned that requiring debtors to pay their disposable earnings to their creditors in involuntary chapter 13 cases could amount to involuntary servitude in violation of the thirteenth amendment and that debtors would refuse to cooperate in those circumstances.[8] However, no comparable provision in chap-

[7] Section 707(b) denies use of chapter 7 to an individual whose debts are primarily consumer debts if the debtor is able to pay those debts, 11 U.S.C. § 707(b) (1988). Section 727(a)(8) bars debtors from discharge under chapter 7 if they have been granted a discharge under chapter 7 or chapter 11 in a case commenced within six years of the current filing, 11 U.S.C. § 727(a)(8) (1988) and, contrary to the amicus, is not a section governing eligibility.

[8] The House Report states:

> The thirteenth amendment prohibits involuntary servitude. Though it has never been tested in the wage earner plan context, it has been suggested that a mandatory chapter 13, by

ter 11 requires the debtor to pay future wages to his creditors.[9] Any involuntary chapter 11 debtor who does not wish to commit future cash flow to repayment of his debts would be entitled to propose a plan of liquidation under chapter 11, which could be confirmed even over the objections of creditors so long as the creditors received not less than they would in a chapter 7 liquidation and the other "cram-down" requirements of section 1129 were met. Thus, no involuntary chapter 11 debtor can be compelled to toil for his creditors in violation of the strictures against involuntary servitude.

Second, the possibility that some individuals might refuse to cooperate if subjected to involuntary chapter 11 proceedings does not justify an absolute prohibition against the use of chapter 11 by individuals, and especially those who voluntarily commence chapter 11 cases. As noted above, those who wish a fresh start without the burdens of continuing payment obligations may propose liquidating plans. In addition, section 1112(b) permits the bankruptcy court to dismiss or convert an

> forcing an individual to work for creditors, would violate this prohibition. On policy grounds, it would be unwise to allow creditors to force a debtor into a repayment plan. An unwilling debtor is less likely to retain his job or to cooperate in the repayment plan, and more often than not, the plan would be preordained to fail. Therefore, the bill prohibits involuntary cases under chapter 13, and forbids the conversion of a case from chapter 7, liquidation, to chapter 13, unless the debtor requests.

H.R. Rep. No. 595 at 120 (citations omitted), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6080-6081.

[9] Section 1123(a), which lists the required contents of a chapter 11 plan, does not require the inclusion of future earnings. 11 U.S.C. § 1123(a) (1988). Nor are such earnings included in the property of the bankruptcy estate under section 541(a)(6). 11 U.S.C. § 541(a)(6) (1988). *See* L. King, 4 *Collier on Bankruptcy*, ¶ 541.19, at 541-102 (15th ed. 1990) ("Expressly excluded from this provision [section 541(a)(6)] are earnings from services performed by an individual debtor after commencement of the case.").

involuntary chapter 11 case to a case under chapter 7 "for cause," which would presumably include the debtor's recalcitrance or failure to cooperate in proposing or effecting a plan.[10] Because the Code gives the bankruptcy court considerable discretion in dealing with uncooperative debtors, the possibility that some individual debtors without businesses will be uncooperative in involuntary cases is no justification for an absolute rule barring all such individuals from using chapter 11.[11]

6. The claim that allowing a non-business debtor to proceed under chapter 11 somehow would enable him "to shield both his disposable income and his non-exempt personal assets from his creditors," Amicus Brief at 20; *see also id.* at 21, is likewise meritless. A chapter 11 plan may not be confirmed over the objections of creditors unless the creditors receive at least as much as they would in a chapter 7 liquidation.[12] If a consumer debtor chooses both to retain possession of his non-exempt assets and to shield his disposable income, then he will be required either to obtain fresh money from a third party or sell exempt assets in order to ensure that this requirement is met. In either event, chapter 11 provides no windfall to the debtor.

---

[10] 11 U.S.C. § 1112(b) (1988) (listing examples of "cause").

[11] The argument of the amicus curiae that a chapter 13 case may be converted to a chapter 11 case only where the debtor is engaged in an ongoing business, Amicus Brief at 16, misconstrues the legislative history. Given that the overwhelming majority of chapter 11 cases are filed by businesses, the House Report's admonition to the court to consider the "nature of the debtor's business and other similar factors," H.R. Rep. No. 595 at 428, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6384, in exercising its discretion to convert a case from chapter 13 to chapter 11 can only be viewed as a reflection of one factor which should be considered when businesses are involved, and not a bar against conversions by consumer debtors.

[12] 11 U.S.C. § 1129(a)(7) (1988).

7. Finally, the court's considerable discretion to dismiss or convert chapter 11 cases to cases under chapter 7 "for cause" should alleviate any concern that the courts might be "flooded with suspect, jerry-built plans, which eventually would prove unworkable." Amicus Brief at 22. Chapter 11 plans brought in bad faith cannot be confirmed, 11 U.S.C. § 1129(a)(3)(1988), nor can chapter 11 plans be confirmed over the objection of creditors unless those creditors receive at least the amount they would receive in a liquidation under chapter 7, 11 U.S.C. § 1129(a)(7)(1988). In view of the ordinarily greater expense and the greater complexity of proceedings under chapter 11, individuals without businesses will in all likelihood commence chapter 11 cases only in the relatively rare circumstances where the creditors will receive at least what they would otherwise receive in a chapter 7 liquidation and the debtor has the potential to receive more than in a chapter 7 liquidation.[13] Accordingly, the possibility that some consumer debtors might inappropriately file chapter 11 petitions offers no support for the contention that this Court should read into the Code a flat prohibition against chapter 11 proceedings by individuals not engaged in business. To the contrary, forcing individual debtors who are not eligible for chapter 13, such as petitioner, into liquidation under chapter 7 serves no policy and benefits no one: not debtors, not creditors and not the public.

---

[13] *See generally* Herbert, *Consumer Chapter 11 Proceedings*, 91 Com. L.J. 234, 233-239 (1986).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:
JONATHAN W. BELSKY
7818 Forsyth Blvd.
Suite 200
Clayton, Missouri 63105
(314) 726-5068

TIMOTHY B. DYK
(Counsel of Record)
PETER M. LIEB
DOUGLAS B. LEVENE
PATRICK J. POTTER
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for Petitioner

April 15, 1991